No. 80-1706

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In The

Supreme Court of the United States

October Term, 1980

DOUGLAS LaCHANCE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United State Courthouse in the City of New York, on the 12th day of February one thousand nine hundred and eighty-one.

Present: HONORABLE J. EDWARD LUMBARD
HONORABLE JAMES L. OAKES,
HONORABLE JON O. NEWMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v-

DOUGLAS LaCHANCE,
Defendant-Appellant.

80-1629

O R D E R

Defendant-appellant Douglas LaChance, former President of the Newspaper and Mail Deliverers Union (NMDU), appeals from a judgment of the District Court for

the Southern District New York (Milton Pollack, Judge) convicting him after a jury trial of 58 counts of extorting labor payments in violation of 18 U.S.C. §1951 (the Hobbs Act), 62 counts of receiving unlawful labor payments in violation of 29 U.S.C. §186 (the Taft-Hartley Act) one count of conducting the affairs of NMDU through a pattern of racketeering in violation of 18 U.S.C. § 1962 (the RICO Act), and 3 counts of tax evasion in violation of 26 U.S.C. §7201. We affirm in part and reverse in part.

1. The motion to suppress the tape recording of the conversation between La Chance and DiPalermo was properly denied. The officers' transcript of the conversation and the affidavit submitted in support of the application for an amendment of the eavesdropping warrant disclosed probable cause to believe that the conversation

concerned loansharking in violation of New York's usury laws. The claim that the supporting affidavit was rendered deliberately or recklessly false by inaccuracies in the accompanyingy transcript did not entitle the defendant to relief under Franks v. Delaware, 438 U.S. 154 (1978). A presumption of validity attached to supporting affidavits. Id. at 171. After listening to the recording, Judge Pollack found that the officers' transcript was reasonably accurate. Based on our own comparision of the tape and the transcript we cannot say that this finding was clearly erroneous. Accordingly, suppression on this ground was not required. See United States v. Barnes, 604 F.2d 121, 152 (2d cir. 1979), cert. denied, 100 S.Ct. 1833 (1980). The claim that the affidavit was false and misleading in its allegation of compliance with minimization

standards is without merit. The materials submitted to the District Court reflected a reasonable effort to intercept only narcotics-related conversations involving one of the individuals named in the warrant. DiPalermo was so named. The words that were interpreted by the monitoring officer as evidence of usury were spoken only moments after the interception began. DiPalermo had been overheard discussing usury only days earlier. To continue the interception of this non-innocent conversation for an additional seven minutes after these words were spoken was not unreasonable, and reasonableness is all that the statute demands. See United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), cert.denied, 417 U.S. 936 (1974).

2. Admission of the tape recording was well within the scope of the District Court's discretion. A tape recording

should be excluded for inaudibility only when the "unintelligible portions are so substantial as to render the recording as a whole untrustworthy." United States v. Bryant, 480 F.2d 785, 790 (2d Cir. 1973). Otherwise, the inaudibility of a part of a tape recording goes to weight, not admissibility. United States v. Provenzano, 615 F.2d 37, 40 n.4 (2d Cir.), cert. denied, 100 S.Ct. 2921 (1980). Judge Pollack was able to "hear reasonably clearly the matters set forth in the recording," and he concluded that it was "certainly sufficiently intelligible . . . that a jury listenting to [it] could reach a fair conclusion as to what the subject matter was." After listening to the tape, we agree. We note, moreover, that the jurors were given the Government - and defense-prepared transcripts of the recording and were instructed to make

their own findings of what the recording contained. Admission of the recording was proper in every respect. See United States v. Carson, 464 F.2d 424, 436-37 (2d Cir.), cert. denied, 409 U.S. 949 (1972).

3. The cross-examination of LaChance concerning his knowledge of the criminal records of Troy, DiPalermo, and West was ill-advised in view of the risk of prejudice to the defendant, but the prosecutor's questions did not warrant a mistrial and are not cause for reversal. The questions objected to were at least arguably permissible to rebut LaChances' claims that he always had acted in the best interests of NMDU and had strived in his associations to avoid even the appearance of impropriety. Accordingly, there is no basis for reversal on the ground that the questions were "purely inflammatory" and were asked in bad faith. The claim that the jury could

have convicted solely because the questions may have disclosed a general criminal propensity is meritless. The questions concerned the defendant's knowledge of the criminal records of others, not his own criminal record. The jury already knew that LaChance associated with at least two persons (Braunstein and O'Hearn) who had been convicted of making unlawful labor payments. Seven other individuals testified that they also made unlawful payments to LaChance. Viewing the prosecutor's questions, which constituted a small fraction of the cross-examination of the defendant, in light of the entire record developed during the course of the two-week trial, we are convinced that the questions did not impermissibly contribute to the verdict.

4. The evidence of venue on the tax counts, viewed in a light most favorable

to the Government, was sufficient to permit the jury to find that LaChance committed an affirmative act of tax evasion in the Southern District. The evidence showed that LaChance received cash payments in the Southern District that he failed to report on his federal tax return. Care was taken to ensure that the payments were in cash, and no records of the payments were kept by LaChance. See United States v. Spies, 317 U.S. 492, 499 (1943).

5. The evidence of venue on the Taft-Hartley counts was at least marginally sufficient as to all but the counts involving the Weinberg acquisition payments.

a. The evidence as to the Russ Trucking payments (counts 130-33) showed that the cash that was demanded and received by LaChance was obtained at his direction from a Manhattan bank. The

jury could infer from this evidence that in each instance the violation of §186(b) began or continued in the Southern District within the meaning of 18 U.S.C. §3237.

b. The evidence as to the Weinberg layoff payment in October 1976 (count 127) showed that this was merely another "usual payment of $3,000 per man" that Weinberg previously had delivered to LaChance through Braunstein. See App. 1072, 1102-03, 1114-15, 1161. The evidence further showed that Braunstein conducted his affairs from his office in the Southern District. See App. 814-15, 921-22, 953. We think the jury reasonably could infer from these circumstances that the payment in question was part of an unlawful course of conduct that began or continued in the Southern District.

c. The evidence as to the Weinberg acquisition payments of December 1977 (count 127), February 1978 (count 128),

and July 1978 (count 129) was insufficient to permit a finding of venue in the Southern District. So far as we can tell, there was no evidence that payments of this nature had been made in the past to LaChance at the urging of Braunstein. It appears that the payments were first suggested to Weinberg by Alvino in Weinberg's office in the Eastern District, pursuant to conversations between Alvino and LaChance at an unspecified location, and delivered by Alvino to LaChance in the Eastern District, App. 1074-83, 1168. The convictions on these counts must be reversed.

d. The evidence as to the Gelfand labor-peace payments (counts 38-41) was marginally sufficient to permit a finding of venue in the Southern District. Gelfand testified that Braunstein was the intermediary between the wholesalers and

NMDU, App. 1008; that he consulted Braunstein regarding his problems with NMDU, App. 1009, particularly during the wholesalers' meetings in the Southern District, App. 1008, 1009-10; and that Braunstein had told him that he would have to make payments to the Union, App. 1010-11. The evidence showed that Braunstein told other wholesalers that a "laundry list" of payments had to be made to the Union, App. 301. Braunstein collected labor-peace payments from the other wholesalers. Finally, Gelfand testified that he made the payments in question to LaChance pursuant to Braunstein's suggestion. App. 1016. There was no direct evidence as to where this conversation occurred, but we think the jury reasonably could infer from the totality of the circumstances that Braunstein either made this particular suggestion in the Southern District or that Gelfand's practice of making labor

peace-payments had its origins in conduct ocurring in that District. Accordingly, we conclude that although the payments in question were delivered in New Jersey, a sufficient basis was shown to infer that the payments were solicitated in the Southern District.

e. The evidence as to the Gelfand Christmas payments of 1976-78 (counts 78-91) and the Gelfand election payments of 1976-78 (counts 114-16) was essentially the same as the evidence concerning the labor-peace payments, and we conclude, by the same reasoning applicable to those payments, that the evidence was marginally sufficient to support a finding of venue in the Southern District on these counts as well. Braunstein collected Christmas and election payments every year from the other wholesalers who also relied on Braunstein to avoid and resolve problems

with the leadership of NMDU. See App. 826-30. These payments appear to have been part of the "laundry list" of payments that Braunstein discussed with all the wholesalers, including Gelfand, at the meetings in the Southern District. See App. at 301, 1008-11. Thus even thought the payments were delivered in New Jersey, we think the jury could reasonably conclude that the payments were part of an unlawful course of conduct that began or continued in the Southern District.

f. The evidence as to the Feldman election payment of May 1979 showed that when Feldman joined the suburban Wholesaler's Association, Braunstein informed him that he would have to make payments for "certain things." App. 633-34. Thereafter, Feldman delivered election payments to Braunstein either in the latter's office or in a Howard Johnson's in the Bronx. App. at 637-39. We think the jury could

reasonably infer from this evidence that the payment in question, though delivered in the Eastern District, originated from conduct occurring in the Southern District.

g. The evidence as to the Feldman contract payment of May 1979 (count 122) showed that after Feldman was informed by Braunstein of the payoff scheme, he made payments to Braunstein in connection with the negotiation of every subsequent collective bargaining agreement. App. 633-34. Here again, we conclude that the payment in question, though delivered in the Eastern District, could be viewed by the jury as part of a course of conduct that began or continued in the Southern District.

5. The convictions on the Russ Trucking counts are supported by sufficient evidence, and the jury instructions as to these counts were proper. There was ample evidence that the Russ Trucking

drivers would or could become members of NMDU but for LaChance's conflict of interest. NMDU represents employees engaged in the handling and delivery of newspapers in a territory that included Connecticut, the location of Russ Trucking, and the Russ Trucking drivers do this very type of work. The 1974 agreement between NMDU and El Diario could not reasonably be interpreted to preclude unionization of Russ Trucking's employees. the fact that the charge conformed to the literal terms of the absolute statutory prohibition against payments by any employer to an officer of a union that would admit to membership the employer's employees is no cause for holding that the charge was erroneous. The meaning of the statute is clear. Moreover, the scope of the prohibition conveyed by the plain terms of the statute did not require a qualifying instruction that the statute

would not apply to LaChance if he owned Russ Trucking. The literal terms of the statute make no exception for firms in which a union official may have an ownership interest, and Congress wanted the statute to have the broadest possible scope in order to protect employees. See United States v. Roth, 333 F.2d 450, 453 (2d Cir. 1964), cert.denied, 380 U.S. 942 (1965); United States v. Annunziato, 293 F.2d 373, 379 (2d Cir.), cert.denied, 368 U.S. 919 (1961). The jury could reasonably find that the Russ Trucking payments were detrimental to the interests of the firm's employees. Such abuse of union power, which the statute was intended to prevent, is not beyond the reach of the statute merely because the payee may have an ownership interest in the payor. See United States v. Overton, 470 F.2d 761 (2d Cir. 1972), cert.denied, 411 U.S. 909 (1973).

6. The claim that the convictions on the Hobbs Act counts must be reversed for lack of evidence of reasonable fear is without merit. The jury was properly instructed that to prove a Hobbs Act violation the Government had to show that the wholesalers made the payments out of a reasonable fear of economic injury. See United States v. Daley, 564 F.2d 645, 650 (2d Cir. 1977), cert.denied, 435 U.S. 933 (1978). The issue of each wholesaler's state of mind was peculiarly within the province of the jury. See United States v. Sears, 544 F.2d 585 (2d Cir. 1976). Moreover, the evidence as to each of the disputed counts was clearly sufficient. Klinghoffer testified that Braunstein told him that he would have to make payments in connection with the contract with NMDU, App. 382, and Klinghoffer also testified from experience that union

problems could be "very costly," App. 379. The claim that he made the payments just to be "friendly" does not accurately reflect his testimony. He stated that it was good business to be friendly with union officials, App. 426, in order to avoid "very costly" problems. The absence of testimony by Passaic executives did not preclude a jury finding that the Passaic payments were delivered to LaChance through Braunstein out of a reasonable fear of economic injury. Braunstein's testimony and that of the other wholesalers amply supported a finding that all the executives who made payments to LaChance through Braunstein did so to avoid retaliation. Nicol's testimony showed that Metropolitan made the payments on Braunstein's "laundry list" to avoid "bad trouble." App. 301-04. The claim that the strike payments were not made out of a reasonable fear is

frivolous. Braunstein believed that unless the payments were made, the wholesalers would not be "permitted" to handle the interim papers. App. 839. The testimony of the other wholesalers showed that they shared his belief that the payments were absolutely required. See App. 186-87, 639-40, 1085, 1027-08.

7. The claim that the sentence was improper under United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974), cert.denied, 423 U.S. 897 (1975), is without merit in light of United States v. Grayson, 438 U.S. 41, 52 (1978), which permits a court to weight the defendant's perceived perjury as a facter in determining an appropriate sentence.

For the foregoing reasons, we reverse the convictions on counts 127, 128, and 129, affirm the judgment in all

other respects, and remand for resentencing in light of the reversal of the convictions on counts 127, 128, and 129.[1] The mandate shall issue forthwith.

/s/
Hon. J. Edward Lumbard

/s/
Hon. James L. Oakes

/s/
Hon. Jon O. Newman

Circuit Judges.

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1. The effective aggregate sentence on all counts was imprisonment of 12 years, four months, and a fine of $100,000. The sentence on each of counts 127, 128, and 129 was two months' imprisonment and fine of $500. Two-month sentences on all 62 of the Taft-Hartley counts, including these three counts, were to run consecutively to each other for a total, on those counts,of 10 years, four months. This total term is to run concurrently with the ten-year term imposed on the RICO count. Two-year sentences on the three tax counts were to run concurrently with each other but consecutively to the sentences on all other counts. All fines were cumulative. Therefore, reversal of the convictions on three of the Taft-Hartley counts will presumably result in a reduction of six months in the aggregate sentence on the Taft-Hartley counts to a

total of nine years and ten months; however, this will presumably result in only a four-month reduction in the aggregate sentence on all counts, since the two years on the tax will still result in a total aggregate sentence of 12 years. Reversal of conviction on the three Taft-Hartley counts will presumably reduce the aggregate fines by $1,500 to a total of $98,500. In entering a revised judgment, the District Court may wish to consider revising Part C, covering the Taft-Hartley counts, to make clear that counts 64, 67, 75, 77, and 78 were dismissed; absence of that notation after the reference in the judgment to counts "62 through 81" appears to make the total of Taft-Hartley counts greater by five than the true number.

APPENDIX B

29 U.S.C. §186.
Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest or an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any

of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or

employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as definded in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or

in connection with the unloading, of the cargo or such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason, of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court

or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or comodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative,

for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written

agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection

by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value

paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, and their families, and dependents for counsel or

plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officiers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more thant $10,000 or to imprisonment for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrian violations of this section, without regard to the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947,

until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

APPENDIX C

26 U.S.C. §7201

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

APPENDIX D

Rule 18, Federal Rules of Criminal Procedure.
Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.